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No. 98-215

In the Supreme Court of the United States

OCTOBER TERM, 1997

ANDREA HELLER, PETITIONER,

v.

FORTIS BENEFITS INSURANCE COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT FORTIS BENEFITS INSURANCE COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the court of appeals correctly determined that an ERISA plan fiduciary, such as Fortis, may be entitled to an award of restitution based on a theory of unjust enrichment, where the fiduciary has paid benefits to a person later found to be ineligible to receive them.

II. Whether the court of appeals correctly granted summary judgment in favor of Fortis, notwithstanding Fortis' failure to notify petitioner in its initial termination letter that she had a right to appeal Fortis' determination, where Fortis subsequently informed petitioner it would treat her submission of additional documents as an appeal, but petitioner filed her lawsuit two days later, and alleged that she had exhausted her administrative remedies.

STATEMENT UNDER RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent Fortis Benefits Insurance Company states that its parent companies are Fortis AG, Fortis AMEV, Fortis, Inc., Interfinancial, Inc., and Fortis Insurance Company f/k/a Time Insurance Company, and that its only non-wholly owned subsidiary is Dental Health Alliance, L.L.C.

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BRIEF FOR RESPONDENT FORTIS BENEFITS INSURANCE COMPANY IN OPPOSITION

STATEMENT OF THE CASE

As this case was litigated in the courts below, the central issue was whether respondent Fortis Benefits Insurance Company ("Fortis") correctly determined in January 1992 that petitioner was not "totally disabled" within the meaning of the disability insurance policy purchased by petitioner's former employer. The district court held, and the court of appeals agreed, that Fortis was entitled to summary judgment on that issue because the undisputed evidence showed that petitioner was able to perform the material duties of a gainful occupation for which she was reasonably fitted by education, training, or experi-

ence. In this Court, petitioner does not deny the substantive correctness of this fundamental determination, nor does she ask the Court to reexamine the lower courts' ruling on the point. Instead, she concentrates entirely on two subsidiary issues, both of which she mischaracterizes and neither of which warrants review.

In particular, petitioner challenges the final portion of the court of appeals' decision, which sustains the district court's restitutionary award to Fortis for benefits paid to petitioner under a reservation of rights during a period when petitioner was not "totally disabled" under the terms of the plan. Petitioner asserts that the courts of appeals are divided regarding whether such a right of restitution exists under ERISA. In fact, however, the cases cited by petitioner all address the different issue of whether an employer can seek restitution for contributions mistakenly made to an ERISA plan on behalf of an employee. There is no disagreement among the courts of appeals that ERISA affords discretion to grant restitution to ERISA plan fiduciaries, such as Fortis, that have paid benefits on a provisional basis, while an eligibility determination is being made.

Petitioner also argues that review should be granted because Fortis did not notify her in its termination letter that it had an appeal procedure in place and that she had a right to use it. In fact, however, after petitioner submitted additional documentation, Fortis notified her that it would treat her submission as an appeal. Petitioner did not await the outcome of that appeal but instead filed this lawsuit two days later. Petitioner thus had a full opportunity for administrative review of Fortis' determination that she was not disabled, but she chose to forgo that opportunity and proceed directly to court. The petitioner's protestations that the court of appeals' decision encourages unnecessary litigation ring especially hollow in light of petitioner's own election to pursue this lawsuit rather than an administrative appeal.

A. Fortis' Payment of Disability Benefits and Termination of Heller's Claim

Beginning in March 1985, petitioner Andrea Heller worked as a traveling computer sales representative for McCue Systems, Inc. ("McCue"). A. 101. On July 1, 1985, Fortis issued a group long term disability policy #G 35-533-5 ("the policy") to McCue that covered McCue's employees, including Heller. A. 57, ¶ 5; A. 25-26, ¶ 6; A. 35, ¶ 6.[1]

According to the terms of the policy, a person insured is "totally disabled" if:

> A. *Occupation Test*
>
> (i) during the first 60 months of any One Period of Total Disability, the Person Insured is under the regular care and attendance of a Licensed Physician (other than him or herself) and unable to perform the material duties of his or her regular occupation or employment; and
>
> (ii) after the first 60 months of any One Period of Total Disability, the Person Insured is unable to perform the material duties of any and every gainful occupation or employment for which the person is or becomes reasonably fitted by education, training or experience.
>
> B. *Earnings Test*
>
> If a Person Insured is working, and is not disabled by the Occupation Test definition of Total Disability, we will consider the Person Insured to be "Totally Disabled" during any month when he or she is not able, because of Injury, sickness or pregnancy, to earn more than 50% of his or her Monthly Earnings. . . .

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[1] "A." refers to the parties' appendix in the court of appeals. A copy of the appendix has been lodged with the Clerk of this Court.

A. 81-82; A. 57, ¶ 6. Fortis considers a "gainful" occupation or employment to be a job that pays at least the gross monthly long-term disability benefit the claimant receives while collecting disability benefits from Fortis. A. 57, ¶ 6; A. 239-40.

On March 7, 1986, Heller first applied for benefits under the policy. A. 103. She characterized her disability as "Severe Stress and Anxiety," for which she first sought medical treatment on January 17, 1986, only about ten months after she began working for McCue. *See id.* Her Claim Statement was accompanied by an Attending Physician Statement of Disability indicating that Heller was totally disabled at that time. A. 58, ¶ 8; A. 103-05; A. 26, ¶ 8; A. 35, ¶ 8. Subsequent physicians' statements indicated that Heller also had physical problems involving her back, neck, and shoulder that prevented her from performing her job at McCue because the job involved extensive travel and the lifting of heavy demonstration bags. *See* A. 58-59, ¶ 9; A. 107-44. In reliance on these statements, Fortis determined that Heller was "totally disabled" under subsection (i) of the Occupation Test and for the first 60 months of her "disability" (*i.e.*, January 24, 1986 to January 24, 1991) paid her the gross monthly long-term disability benefit of $1801.00, or $21,612 a year (12 × $1801.00). A. 59, ¶ 9; A. 146.

Once the first 60-month period expired on January 24, 1991, the issue of whether Heller remained totally disabled implicated subsection (ii), rather than subsection (i), of the policy's Occupation Test. *See* A. 81. Accordingly, Fortis undertook a review of Heller's claim to determine whether she was "totally disabled" under the standard set forth in subsection (ii). During the review period, Fortis kept Heller apprised of the status of her claim, and Fortis continued to pay benefits to Heller until January 1992. *See* A. 178-79; A. 204-05; A. 207-09. Fortis advised Heller in writing, however, that the con-

tinued payment of benefits after the first sixty months of disability "should not be construed as an admission of liability on our part to continue benefits indefinitely beyond the first sixty months of disability." *See* A. 179, 208.

The undisputed medical and vocational evidence that was before Fortis at the time it terminated Heller's benefits led Fortis to conclude that Heller was not "totally disabled" from performing the material duties of any and every gainful occupation for which she was reasonably fitted. A. 67, ¶ 29. Two independent medical evaluations and the opinions of Heller's treating physician indicated that she was able to perform sedentary or light work as an inside salesperson. A. 59-61, ¶¶ 11-14; A. 63-64, ¶ 21. A vocational consultant conducted a vocational assessment and labor market survey showing that Heller had the necessary education, qualifications, and transferable skills to work as an inside salesperson, and confirming that gainful inside sales jobs existed in the relevant market. A. 62-63, ¶¶ 18-20; A. 185-88; A. 190-92.

Based on this evidence, as well as evidence uncovered by Fortis suggesting that Heller was performing work for her husband's law firm, Fortis notified Heller on January 15, 1992 of the termination of her benefits retroactive to January 24, 1991, and provided as reasons for the termination the medical and vocational evidence showing that Heller was not totally disabled under Section A(ii) of the policy, as well as evidence showing that Heller worked for her husband's law firm, Cunningham & Associates. *See* A. 68, ¶ 30; A. 235-36.

Approximately one month after Fortis sent Heller the termination, Heller's attorney, Mr. Cunningham, forwarded additional documentation to Fortis regarding Heller's claim. Fortis then notified Mr. Cunningham in writing on February 19, 1992 that it was treating this submission as an appeal of the termination. *See* A. 371.

B. Heller's Initiation of Her Court Action and Proceedings in the District Court

On February 21, 1992, only two days after Fortis informed Heller that it would treat her submission of additional documents as an appeal, Heller filed this lawsuit against Fortis in the Superior Court of the District of Columbia. In her original complaint, Heller attempted to plead a common law action for injunctive relief, specific performance, and bad faith refusal to pay that was, in essence, a breach of contract claim. Fortis removed the case to federal court and moved to dismiss the complaint, on the ground that the Employee Retirement Income Security Act ("ERISA") preempted Heller's common law claims.

In April 1992, Heller filed an amended complaint together with an opposition to Fortis' motion. The amended complaint referred to ERISA, but still pleaded primarily common law causes of action, and suffered from an array of deficiencies. Fortis therefore moved to dismiss the amended complaint. The district court granted Fortis' motion and dismissed the complaint without prejudice. Rather than amend her complaint a second time, Heller appealed the district court's dismissal. The court of appeals affirmed, but the court noted that Heller remained free to file a second amended complaint. Pet. App. A-21 to A-23.

Heller filed her second amended complaint in February 1994. A. 10. She alleged, among other things, that she had exhausted her administrative remedies prior to filing suit. A. 13, ¶ 9. Fortis answered the second amended complaint and counterclaimed against Heller, seeking reimbursement of the benefits that Fortis paid during the period from January 24, 1991 to January 15, 1992, when Heller did not satisfy the policy's definition of "totally disabled." A. 20.

Heller moved for summary judgment in September 1994, and the district court denied the motion in June 1995. A. 3, 4. Heller again moved for summary judgment in May 1996. At the same time, Fortis cross-moved for partial summary judgment on both Heller's claim for benefits and Fortis' counterclaim for restitution of the amounts paid to Heller after January 24, 1991. The district court conducted a de novo review of the administrative record that was before Fortis at the time it terminated Heller's benefits. *See* A. 796. Based on the medical, vocational, and other evidence in the record, the court concluded that Heller was not totally disabled under the "Occupation Test" set forth in the policy. A. 799. The court further determined that Fortis was entitled to restitution in the amount of $19,811 for the period during which Fortis paid Heller a monthly benefit while she was not "totally disabled." A. 800-01. The district court accordingly denied Heller's motion for summary judgment and granted Fortis' motion for partial summary judgment. A. 802. After the parties stipulated to the resolution of the remaining issues in the case, the court's judgment became final. *See* A.8.

C. The Court of Appeals' Decision

The court of appeals affirmed. Pet. App. A-2. Heller argued, as she had before the district court, that Fortis improperly failed in its termination letter to advise Heller of her right to appeal the adverse decision, thus allegedly violating Section 503 of ERISA and its accompanying regulations. The court of appeals determined, however, that Fortis had substantially complied with Section 503 because "before Heller filed her lawsuit, she was informed of her right to appeal and that appeal proceedings were being commenced. Fortis advised Heller through her present attorney on February 19, 199[2], a month after sending the termination letter, that it would treat various documents sent by her as an appeal." Pet. App. A-12;

A. 371. The court of appeals further observed that it had no occasion to determine whether the appeal procedure made available by Fortis was adequate because "Heller never made or attempted to make use of Fortis' appeal process," but instead "immediately" filed her lawsuit against Fortis, thus "shortcut[ting] any review that might have occurred." Pet. App. A-12 to A-13. On the merits, the court of appeals agreed with the district court that Heller had failed to present a genuine issue of material fact regarding her alleged qualification for disability benefits under Fortis' plan. *See* Pet. App. A-17.

Finally, the court of appeals ruled that, on a theory of unjust enrichment, restitution is an available remedy for Fortis under ERISA, and that the district court did not abuse its discretion in ordering a restitutionary award. The court reasoned that "Fortis had previously notified Heller in writing that its payment of benefits after the first five years could not be deemed an admission of liability," and that, "[r]easonably viewed, Fortis thereby notified Heller that it expected reimbursement for benefits for which she was not eligible." Pet. App. A-17 to A-20.

ARGUMENT

The court of appeals' decision is correct, and further review is not warranted. The court of appeals correctly upheld the district court's determination that Fortis was entitled to restitution for benefits it paid to Heller during a period of time when she was not "totally disabled" under the ERISA plan. The cases cited by Heller do not address the issue presented by this case—whether an ERISA plan fiduciary may obtain restitution for benefits paid on a provisional basis to a person later found to be ineligible for those benefits. Instead, petitioner's cases all address the very different issue of whether an employer can recover from an ERISA plan contributions erroneously made on behalf of an employee. The courts of appeals that have considered the issue presented in this

case have uniformly held that restitution is an available remedy for an ERISA plan fiduciary, such as Fortis.

The court of appeals also correctly upheld the district court's decision to grant summary judgment in favor of Fortis with respect to the merits of Heller's claim for benefits. The petition does not take issue with Fortis' decision that Heller was not "totally disabled" under subsection (ii) of the Occupation Test. Instead, Heller complains that Fortis did not notify her in its termination letter that she had the right to appeal the adverse decision. As both the district court and the court of appeals ruled, however, Heller did not take advantage of the appeal procedures that Fortis did provide, even after Fortis clearly informed Heller that it would treat her submission of additional documentation as an appeal from the initial termination of benefits. Instead, Heller short-circuited the process and filed her complaint, claiming that she had exhausted her administrative remedies. Having elected this course, Heller is in no position to argue either that Fortis' appeal procedures are in some way deficient or that the court of appeals' decision encourages unnecessary litigation.

I. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS REGARDING AN ERISA PLAN FIDUCIARY'S RIGHT TO OBTAIN REIMBURSEMENT FOR BENEFITS PAID TO PERSONS NOT ELIGIBLE TO RECEIVE THEM, AND THE COURT OF APPEALS CORRECTLY SUSTAINED THE AWARD OF RESTITUTION TO FORTIS.

Citing a line of inapposite decisions involving the issue of whether *an employer* may sue *an ERISA plan* to recover contributions mistakenly paid, Heller claims that there is a split of authority regarding "whether restitution is a permissible remedy under ERISA." In fact, the applicable case law on the issue presented in this case—whether *an ERISA plan fiduciary* is entitled to recover

benefits paid to ineligible persons—is quite consistent, with only one district court having reached a result that is out of step with the decisions of the several other courts to have addressed the issue.

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides that "[a] civil action may be brought . . . by a . . . *fiduciary* . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief . . . to redress such violations . . . ." *Id.* (emphasis added). Moreover, all of the courts of appeals, and all but one district court, that have addressed the issue have concluded that ERISA allows the courts to apply the federal common law doctrine of unjust enrichment to award restitution to an ERISA plan fiduciary for erroneously paid benefits. *See Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1186 (3d Cir. 1991) (awarding restitution for a mistaken payment to a nonbeneficiary); *Blue Cross & Blue Shield v. Weitz*, 913 F.2d 1544, 1548, 1549 (11th Cir. 1990) (affirming the district court's holding that " '[a]n equitable action to recover benefits erroneously paid . . . falls within the clear grant of jurisdiction contained in 29 U.S.C. § 1132(a)(3)' "); *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 994 (4th Cir. 1990) (entering judgment for the insurance company plan administrator on a theory of unjust enrichment); *Metropolitan Life Ins. Co. v. Solomon*, 996 F. Supp. 1473, 1476-77 (M.D. Fla. 1998); *Printing Industry of Ill. Employee Benefit Trust v. Stout*, 157 F.R.D. 448, 450 (N.D. Ill. 1994); *Northern Cal. Food Employers & Retail Clerks Unions Benefit Fund v. Dianda's Italian-Amer. Pastry Co.*, 645 F. Supp. 160 (N.D. Cal. 1986). *But see NYSA-ILA GAI Fund v. Poggi*, 617 F. Supp. 847 (S.D.N.Y. 1985).[2]

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[2] Heller relied heavily on the *Poggi* decision at the district and appellate court levels. *Poggi* was decided well before *Luby*, *Weitz*, *Waller*, and *Stout*, however, and several decisions have rejected the

Allowing such a remedy furthers the goal of ERISA "to safeguard the corpus of funds set aside" under the plan. *Luby*, 944 F.2d at 1186. These decisions do not draw any distinction between an insurance company or some other kind of ERISA plan fiduciary. *See Provident Life & Accident Ins. Co.*, 906 F.2d at 986 (entering judgment in favor of insurance company for restitution of benefits); *Metropolitan Life Ins. Co.*, 996 F. Supp. at 1477 (same). Because Fortis is an ERISA plan fiduciary, it was entitled to seek to recoup benefits paid to Heller during a period of time when she was not "totally disabled" and therefore, did not qualify to receive benefits from the plan.

Ignoring the applicable case law cited above, Heller instead cites for the first time a line of cases involving the issue of whether *an employer* is entitled to restitution under Section 403 of ERISA for amounts erroneously contributed to a pension plan. These cases deal with a statutory exception to the general rule under ERISA that "the assets of a plan shall never inure to the benefit of any employer . . . ." 29 U.S.C. § 1103(c)(1).

The non-inurement provisions of ERISA reflect Congress' "overriding concern . . . that employees with long years of employment and contributions are assured of receiving their pension benefits." *Crown Cork & Seal Co. v. Teamsters Pension Fund*, 549 F. Supp. 307, 309 (E.D. Pa. 1982), *aff'd*, 720 F.2d 661 (3d Cir. 1983); *see also Whitworth Bros. Storage Co. v. Central States, Southeast & Southwest Areas Pension Fund*, 794 F.2d 221, 233 (6th Cir. 1986) ("It was the primary intent of Congress that employers not benefit from the assets of a plan"). As an exception, Section 403(c)(2)(A)(ii) provides that the non-inurement provisions of ERISA "shall not prohibit the return of [a mistakenly made] contribution . . . to the employer within 6 months after the plan admin-

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reasoning of the *Poggi* court. *See Weitz*, 913 F.2d at 1548; *Stout*, 157 F.R.D. at 450; *Northern Cal. Food Employers*, 645 F. Supp. at 162.

istrator determines that the contribution was made by such a mistake." 29 U.S.C. § 1103(c)(2)(A)(ii); *see Dime Coal Co. v. Combs*, 796 F.2d 394, 397 (11th Cir. 1986) ("The refund provision at issue in this case modifies section 403(c)(1) of ERISA, which provides that the assets of employee benefit plans be held in trust, and that 'the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries' ") (quoting 29 U.S.C. § 1103 (c)(1)). The decisions cited by Heller interpret Section 403 of ERISA as either allowing an employer to pursue a cause of action for repayment of a mistakenly made contribtuion, or not allowing such a cause of action.

These cases have nothing to do with the question of whether Section 502 of ERISA permits courts to award restitution to plan fiduciaries for benefits paid to ineligible beneficiaries. In fact, Section 502 expressly authorizes ERISA "fiduciaries" to pursue equitable remedies, *see* 29 U.S.C. § 1132(a)(3), (e)(1), but it does not provide any such authorization for actions by employers. *See Crown Cork & Seal Co.*, 549 F. Supp. at 310-11 ("Section 502(e)(1) of ERISA . . . clearly restricts the categories of individuals empowered to bring a civil action to four groups of persons, none of which includes employers"). Moreover, the rationale that restitution to an ERISA plan fiduciary furthers the goal of safeguarding the plan's funds clearly does not apply where an employer is seeking to recover money *from* the plan's funds. In short, there is no split of authority among the circuits regarding the issue presented in this case, the court of appeals reached the correct conclusion, and review should be denied.[3]

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[3] Whether Fortis was entitled to restitution under the facts and circumstances of this case is reviewed only for abuse of discretion. *United States v. Rezaq*, 134 F.3d 1121, 1141 (D.C. Cir. 1998), *petition for cert. filed*, No. 97-9019 (May 7, 1998); *Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F.2d 1176, 1186

II. THE COURT OF APPEALS CORRECTLY REJECTED HELLER'S ARGUMENT THAT SHE HAD NOT RECEIVED ADEQUATE NOTICE OF HER APPEAL RIGHTS, WHERE FORTIS NOTIFIED HELLER THAT HER SUBMISSION OF DOCUMENTS WOULD BE TREATED AS AN APPEAL AND HELLER NEVERTHELESS ELECTED TO FILE HER LAWSUIT AGAINST FORTIS TWO DAYS INTO THE APPEAL PROCESS.

Heller continues to complain that, because Fortis' initial termination letter failed to state that Heller had a rights to appeal the benefits determination, summary judgment should not have been granted to Fortis. Heller also contends that the Fortis appeals process was deficient. As the court of appeals recognized, however, Fortis notified Heller that it would treat her submission of additional documentation as an appeal, but Heller chose to short-circuit the appeal process by filing her lawsuit only two days later. Moreover, Heller averred in her amended complaint that she had exhausted her administrative remedies.

Section 503 of ERISA provides that every employee benefit plan shall "afford a *reasonable opportunity* to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133(2) (emphasis added). The regulations associated with Section 503 provide that the plan shall provide to every claimant who is denied a claim for benefits written notice

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(3d Cir. 1991). As the court of appeals determined, the district court acted within its discretion in awarding restitution, considering that Fortis had notified Heller that it expected reimbursement for benefits for which she was not eligible. Allowing Heller to keep the benefits would have resulted in a windfall to her at the expense of legitimate beneficiaries. *Metropolitan Life Ins. Co.*, 996 F. Supp. at 1477 (holding that a denial of restitution of benefits mistakenly paid to a claimant "would result in a windfall to [the claimant], and would be a miscarriage of justice for other disabled . . . employees").

including the "[a]ppropriate information as to the steps to be taken if the . . . beneficiary wishes to submit his or her claim for review." 29 C.F.R. § 2560.503-1(f)(4).

As the court of appeals correctly observed, substantial compliance with Section 503 of ERISA and its accompanying regulations is sufficient. *Brehmer v. Inland Steel Indus. Pension Plan*, 114 F.3d 656, 662 (7th Cir. 1997); *Kent v. United of Omaha Life Ins. Co.*, 96 F.3d 803, 807 (6th Cir. 1996); *Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 180 (7th Cir. 1994). Thus, even if an initial termination letter does not contain information regarding the appeal process, where subsequent communications between the plan administrator and a claimant provide such information and opportunity for review, that is sufficient to satisfy the "full and fair review" requirement under ERISA. *See Kent*, 96 F.3d at 807 ("[T]he procedures, when viewed in light of the myriad of communications between claimant, her counsel and the insurer, were sufficient to meet the purposes of Section [503] in insuring that the claimant understood the reasons for the denial of the claim as well as her rights to review of the decision"); *see also Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 382 (7th Cir. 1994); *Davidson v. Prudential Ins. Co.*, 953 F.2d 1093, 1096 (8th Cir. 1992). "[I]n assessing [ERISA's] procedural requirements the crucial issue is whether the purpose of Section [503]—that the claimant be notified of the reasons for the denial of the claim and have a *fair opportunity for review*—is fulfilled." *Kent*, 96 F.3d at 807 (emphasis added).

In Heller's case, the record reveals that she knew about Fortis' appeal procedure and had a fair opportunity for review, but nonetheless elected to forgo that review and proceed directly to court. Her failure to take advantage of Fortis' appeal process, despite her knowledge of that process, makes her a poor advocate for the theory that the court of appeals' decision encourages unnecessary litigation. Indeed, it is Heller herself who chose to ignore

the exhaustion requirements and, in lieu of Fortis' appeal procedure, pursue litigation that has been pending now for more than six years.

In any event, even if Fortis' initial termination letter somehow constituted a procedural defect under ERISA, Heller would not be entitled to a substantive remedy, such as the retroactive reinstatement of benefits, without a showing of prejudice. *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1308 (9th Cir. 1986); *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1330 (9th Cir. 1996); *Payne v. Ryder System, Inc. Long Term Disability Plan*, 173 F.R.D. 537, 541 (M.D. Fla. 1997). Heller has never complained of any such prejudice. Nor can she, considering (i) that she elected to file her lawsuit rather than avail herself of Fortis' review process, and (ii) that she has not provided any basis for challenging Fortis' determination that she was not "totally disabled" after January 24, 1991. Accordingly, Heller is not entitled to substantive relief, even if Fortis failed to provide her with notice of its review procedure. *See Kent*, 96 F.3d at 807 ("[J]ustice does not require, indeed it forbids, the reversal of a claim decision based on a technical defect").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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